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"Last year the puzzle of *Reg. v. Ashwell* recurred in an Irish court, and led to no less divergence of judicial opinion (*The Queen v. Hehir* [1895], 2 I. R. 709). The master of a ship pays a laborer his wages in what he—the master—thinks two £1 notes and some silver. One of the notes is really a £10 note. The laborer takes it innocently, finds out the mistake soon afterwards, and makes up his mind to appropriate the note. By five to four the Irish court held that this was not larceny at common law. The judgments were, perhaps, more carefully and elegantly written than in *Ashwell's* case: see especially that of Gibson, J. The lines of argument were much the same: the majority held that the prisoner had lawful possession of the £10 note by a real though mistaken delivery (in which case he clearly could not steal it at common law); the minority that he had no possession at all, but a bare custody, until he discovered the mistake, when he took the £10 note, in a legal sense, for the first time. Mr. Justice Wright's view, which is different from both of these, and upholds the conviction on the ground that there was no delivery in the first instance, but there was a trespassory though excusable acquisition of possession, capable of being made felonious by subsequent *animus furandi* (Pollock and Wright on Possession, p. 210), was referred to, but, we submit, not adequately considered. The choice lies, we think, between this and the theory of no possession at all. Either way the conviction is right."

THE LIEN OF THE WRIT OF FIERI FACIAS IN VIRGINIA.—The Code of Virginia (sec. 3581) provides that "on a judgment for money there may be issued a writ of *fieri facias*." And sec. 3587 enacts: "By a writ of *fieri facias* the officer shall be commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is. The writ may be levied as well on the current money and bank notes as on the goods and chattels of such person, except such as are exempt from levy under chapter one hundred and seventy-eight; and, as against purchasers for valuable consideration without notice and creditors, shall bind what is capable of being levied on only from the time it is delivered to the officer to be executed. The lien of a writ of *fieri facias* under this section, on what is capable of being levied on, but is not levied on under the writ on or before the return day thereof, shall cease on that day: Provided, however, that such lien may be enforced after the return day of the writ by proceedings under chapter one hundred and seventy-six, if such proceedings be commenced before that day."

Under section 3587 the officer obeys the law's command "to make the money therein mentioned [*i. e.*, in the writ of *fieri facias*] out of the goods and chattels of the person against whom the judgment is" by levy on, and sale of, so much of the debtor's goods and chattels as may be necessary. But all of a debtor's personal property is not liable to be *levied on* under a writ of *fieri facias* at common law, but only goods and chattels corporeal, or in possession, as distinguished from incorporeal personality, or *chooses in action*. The Virginia statute (sec. 3587) declares: "The writ [of *f. fa.*] may be levied as well on the current money and bank notes as on the goods and chattels of such person" (*i. e.*, the judgment debtor); but it does not extend the right of levy to *chooses in action* generally. At common law, emblems were liable to levy before severance; but the Code of Virginia, sec. 904, declares that "no growing crop of any kind (not severed) shall

be liable to distress or levy, except Indian corn, which may be taken at any time after the 15th day of October in any year." (But see Public Acts 1889-'90, ch. 149, p. 116, declaring that "sweet potatoes and Irish potatoes, over five barrels of each variety, may be distrained or levied upon for rent after the same have been matured sufficiently to sever or market.") Leasehold interests in land (terms of years or chattels-real) are liable to levy at common law and now in Virginia. As to negotiable paper, it is said, in 4 Min. Ins. (3d ed.) p. 1021: "*Choses in action* are not in general liable to the execution of *fieri facias*, unless, perhaps, in the case of *negotiable securities*, in a state to be *transferred by delivery*." And see 2 Barton's Law Practice (2d ed.), p. 830, which speaks of a "levy on negotiable paper." *Sed quare.* For a special provision for taking and selling *real estate* under a writ of *fieri facias* "upon a judgment or decree against any person indebted or liable to the Commonwealth, or against any security of his," see Code of Virginia, section 687; also, sections 3603-4.

By the law of Virginia before July 1, 1850, incorporeal personal property, such as bills, notes, bonds, stocks &c. (which are also called *choses in action*), was neither liable to levy under a *fieri facias*, nor was that writ a lien on them, by virtue of which they could be reached in any way to satisfy the creditor's judgment. The writ, however, before July 1, 1850, was a lien on all goods and chattels on which it could be levied from the time it was delivered to the sheriff; and at the revision of 1849 (taking effect July 1, 1850) it was enacted, in effect, that, though a *fieri facias* was not *leviable* on *choses in action*, it should henceforth be a *lien* on them, and a method was chalked out by which, by virtue of such lien, they might be made available to the creditor in satisfaction of his judgment. See Code 1849, ch. 188, sec. 3. As re-enacted in the Code of 1887, with some change of language, the statute (sec. 3601) is as follows: "Every writ of *fieri facias* shall, in addition to the lien it has under sec. 3587, on what is *capable of being levied on* under that section [as to this, see above,] be a lien, from the time it is delivered to the sheriff or other officer to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards, and before the return day of the said writ, become possessed or entitled, and which is *not capable of being levied on* under the said section, except such as is exempt under the provisions of chap. 178, and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall not affect him, unless he had notice thereof at the time of the assignment or payment, as the case may be."

Thus it is seen that there are now in Virginia two liens by virtue of a writ of *fieri facias*, the law as to each of which is summarized below.

I. *The Old Lien.* The only lien of a *fieri facias* in Virginia prior to July 1, 1850.

1. *On what a lien?* On things capable of being levied on. Such things, as we have seen, are goods and chattels *corporeal*, as distinguished from *incorporeal* personality, or, in other words, goods and chattels in possession as distinguished from *choses in action*. For example, horses, household and kitchen furniture, &c., are leviable; bonds, notes, and stocks are not. But while goods and chattels *corporeal* are in their nature leviable, they will cease to be so while in the hands of a receiver; for to levy execution upon them would be to interfere with the possession and control of the court. See *Davis v. Bonney*, 89 Va. 755, 760.

2. *From what time a lien?* From the time the writ is delivered to the officer to be executed. And to fix the precise time, the officer is required to endorse on each writ the year, month, day and time of day he receives the same. Code, sec. 3589.

3. *On what does this lien depend?* It depends on a levy being made before the return day of the writ is past; but when this levy is made, then, by relation, the lien takes effect as of the time when the writ was delivered to the sheriff. See the language of sec. 3587, *supra* (added at the revision of 1887): "The lien of a writ of *fieri facias* under this section, on what is capable of being levied on, *but is not levied on*, under the writ on or before the return day thereof, shall cease on that day: *Provided, however*, that such lien may be enforced after the return day of the writ by proceedings under chapter one hundred and seventy-six, if such proceedings be commenced before that day."

4. *What is the effect of this lien as to third persons?*

It is superior even to the claims of a *bona fide* purchaser for value from the execution debtor, provided the chattel is purchased *after* the delivery of the writ to the sheriff, and provided such chattel is levied on before the return day of the writ is past. And it is superior to other executions subsequently delivered to the sheriff, even if such subsequent executions should be first levied. Code of Virginia, sec. 3587; 2 Min. Ins. p. 827.

5. *When does this lien end?*

This lien is a *levy lien*, and there can be no levy lien without a levy. And the levy must be on or before the return day of the writ. If that day passes without a levy, then the potential lien is discharged. But when there is a levy, then the lien relates back to the time when the sheriff received the writ, as has been stated. *Humphrey v. Hitt*, 6 Gratt. 509-527. And see now the language of Code of 1887, sec. 3587, quoted under "3," above; and especially the *Proviso*, as to the effect of which there are as yet no decisions.

6. *Does the lien extend to the property of the execution debtor acquired after the delivery of the writ to the sheriff, but before the return day is past?* It does. *Huling v. Cabell*, 9 W. Va. 531.

II. *The New Lien of the writ of *fi. fa.** In Virginia, since July 1, 1850, on personality not capable of being levied on. *Quare* as to personality capable of being levied on, but not levied on, from July 1, 1850, to May 1, 1888, when the language of the statute was so changed as to exclude such personality from the new lien. *Huling v. Cabell*, 9 W. Va. 531.

1. *How as to the old lien?* It remains in full force, and all the propositions under "I" *supra*, are still law. But since July 1st, 1850, the writ of *fi. fa.* is also a lien on *chooses in action*. This is by way of *addition* to the old lien.

2. *To what property of the execution debtor does the new lien extend?*

Speaking generally, to such things as are not affected by the *old lien*. Hence it extends to *all the personal estate* of the judgment debtor . . . which is not capable of being levied on. Code Va., sec. 3601. This includes incorporeal personality, such as bonds, notes, stocks, debts of all kinds, &c. *Puryear v. Taylor*, 12 Gratt. 401. And this will also include goods and chattels corporeal in the hands of a receiver, and for that reason incapable of being levied on. *Davis v. Bonney*, 89 Va. 755.

3. *From what time does this lien begin?*

From the time the writ is delivered to the sheriff for execution, the same as under the old lien. *Charron v. Boswell*, 18 Gratt. 216; *Frayser v. Richmond, &c. R. Co.*, 81 Va. 388.

4. *On what does this lien depend?*

Nothing more is required than simple delivery to the sheriff to be executed. It is not a levy lien, and could not be, as it applies to things *not capable of being levied on*. *Lien* must not be confused with *levy*. The Virginia statute gives to a *fi. fa.* the effect of a *lien* on *choses in action*. But they are still incapable of being *levied on*.

5. *How is this lien made effective against the debtor's choses in action?*

(1) By filing interrogatories to the debtor himself to ascertain the estate on which the *fi. fa.* is a lien. Code of Va., sec. 3603.

(2) By suggestion and summons to those who owe the execution debtor, followed by process of garnishment. Code of Va., secs. 3609-3616. See 10 Va. Law Journal, p. 1, article entitled "Garnishees."

6. *What is the effect of this lien on third persons?*

The statute expressly provides that it shall yield to assignees for value without notice to whom the execution debtor may assign the chose in action. And a payment to the execution debtor by his debtor in good faith without notice is good against the execution creditor. See *Evans v. Greenhow*, 15 Gratt. 153.

7. *Does this lien attach to choses in action acquired by the execution debtor after the writ is delivered to the sheriff, and before the return day is past?*

Yes, so stated expressly in the Virginia statute, and so decided in West Virginia in *Huling v. Cabell*, 9 W. Va. 531. See 5 Va. Law Journal, p. 471, article entitled "The Lien of the *Fi. Fa.*"

8. *When does the new lien end?*

This lien "shall cease whenever the right of the judgment creditor to enforce the judgment by execution, *scire facias*, or action ceases; or is suspended by a forthcoming bond being given and forfeited, by *supersedeas*, or by other legal process." Code Va., sec. 3602. As to limitation of the right to enforce judgment by execution, see Code, secs. 3577-8; as to the forfeiture of a forthcoming bond, sec. 3619; as to a writ of *supersedeas*, sec. 3453, *et seq.* See *Trevillian's Ex'ors v. Guerrant's Ex'ors*, 31 Gratt. 525, holding that the lien of an execution of *fieri facias* upon a debtor's *choses in action*, though not enforced in the debtor's lifetime, continues after his death as against the other creditors of the debtor.

For the effect of judgment and execution against a city or county treasurer in Virginia, see Code, secs. 615, 616.